No. 11491

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN ZIEGLER, RAYMOND ZIEGLER and WEST COAST SUPPLY CO., a partnership,

Appellants,

vs.

PAUL A. PORTER, Administrator, Office of Price Administration,

Appellee.

APPELLANTS' BRIEF.

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APPELLANTS' BRIEF.

Jurisdiction.

This is an appeal from a temporary injunction issued by the District Court of the United States, Southern District of California, on September 13, 1946.

It was specifically found as a conclusion of law by the said District Court in its interlocutory findings of fact and conclusions of law upon application for preliminary injunction that jurisdiction to issue the preliminary injunction lay within said Court pursuant to the provisions of Section 2(a)-6 of the Second War Powers Act, as amended. (56 Stat. 176, 50 U. S. C. App. Sec. 633, *et seq.*) [Record p. 20.]

This Court of Appeals has jurisdiction upon appeal pursuant to the provisions of Section 129 of the Judicial Code, as amended (26 Stat. 828 (1891), 28 U. S. C. Sec. 227), to review the judgment for preliminary injunction in question.

Statement of Case.

A complaint for injunction was filed in the District Court of the United States, Southern District of California, on August 9, 1946, naming as defendants J. H. Ziegler, Allen Ziegler, Raymond Ziegler, and Paul Ziegler, John Doe and Richard Roe, individually and as partners doing business as the West Coast Supply Co., and the West Coast Supply Co., a partnership. [Record p. 2.]

The complaint alleged that defendants were engaged in the business of dealing with sugar and were subject as wholesalers to the provisions of Third Revised Ration Order No. 3. (11 Fed. Reg. 177.) [Record par. V, p. 3.]

It was further alleged that on July 1, 1946, defendants had a sugar ration balance to their credit in a Los Angeles bank of 23,196 pounds of sugar; that between July 1, 1946, and August 7, 1946, defendants drew, issued and used in payment for four checks totalling 1,370,000 pounds; that defendants' sugar ration bank account was overdrawn in the amount of 1,346,804 pounds. [Record par. VI, p. 4.]

It was alleged that defendants had title to and control of substantial amounts of sugar at their place of business and that 100,000 pounds of sugar were held subject to their control and at their order by a Los Angeles warehouse. [Record par. VIII, p. 4.]

It was thereupon alleged that defendants by overdrawing their sugar ration bank account and by accepting delivery and control of sugar obtained by invalid bank checks, violated the provisions of Third Revised Ration Order No. 3, as amended. [Record par. IX, pp. 4 and 5.]

In paragraph X of the complaint, it was alleged that unless defendants were restrained from issuing further ration bank checks and from overdrawing their ration bank account and from using the sugar then subject to their control, the general public would be deprived and denied their proper allotment of sugar available for public consumption. [Record p. 5.]

The affidavit of an O. P. A. sugar ration officer filed in support of the complaint stated that the officer's investigation showed that the West Coast Supply Co., a defendant, was a wholesaler within the meaning of Third Revised Ration Order No. 3, as amended, and as such maintained a sugar ration bank account in Los Angeles, which as of August 6, 1946, was overdrawn. Further, that the available supply of sugar was in short supply. [Record pp. 8 and 9.]

A further affidavit, that of an O. P. A. investigator, disclosed that certain amounts of sugar were delivered to Los Angeles warehouses for the benefit of the West Coast Supply Co., one of the defendants, on July 1, July 3, and July 29, 1946, and that as of August 9, 1946, 100,000 pounds of sugar were stored in a Los Angeles warehouse for the benefit of the West Coast Supply Co., one of the defendants. [Record pp. 11 and 12.]

Only the defendants Allen Ziegler, Raymond Ziegler and West Coast Supply Co., appellants herein, were served in the action in the District Court.

Upon an order to show cause for preliminary injunction, a hearing was held on August 26, 1946, before the Honorable William C. Mathes, Judge of the District Court of the United States, Southern District of California, and on the basis of his findings of fact and con-

clusions of law [Record pp. 17 to 22], filed September 13, 1946 [Record p. 22], a judgment for preliminary injunction was entered and docketed on September 13, 1946, in Civil Order Book 39, page 667 [Record p. 23] by the terms of which the District Court ordered, adjudged and decreed as follows:

> "It is ordered, adjudged and decreed that a preliminary injunction issue against Defendants Allen Zeigler, Raymond Zeigler and West Coast Supply Co., and each of them, their agents, servants, employees, attorneys and all persons in active concert or participation with said Defendants and each of them, restraining and enjoining them, pending the hearing and determination of this action and until further order of the Court, from
>
> 1. Issuing any sugar ration bank checks in violation of Third Revised Ration Order No. 3, as amended;
>
> 2. Using or permitting the use of or otherwise disposing of any and all sugar now owned by or subject to the control of said Defendants or any of them, except in such manner as shall be directed by order of the Plaintiff, Administrator of the Office of Price Administration, or by his duly appointed agents on his behalf;
>
> 3. Violating any and all of the provisions of Third Revised Ration Order, as heretofore and hereafter amended."

The District Court also made certain findings of fact. [Record pp. 18 to 20.] Among such findings of fact were:

> "7. Unless restrained and enjoined, Defendants and each of them threaten to and will continue to

issue sugar ration bank checks without having in their ration bank account a balance sufficient to cover the amount of such checks.

"8. Unless restrained and enjoined, Defendants and each of them threaten to and will use and dispose of and put beyond their possession and control sugar obtained by means of invalid sugar ration bank checks.

"9. Unless Defendants and each of them are restrained and enjoined from issuing further sugar ration bank checks and from overdrawing their ration bank account or from using or permitting the use of or otherwise disposing of the sugar now subject to their order and control or in their possession, the general public will be denied its right to a proper allotment and proportion of the sugar available for general public consumption.

"Unless Defendants are restrained and enjoined, further violations of Third Revised Ration Order No. 3, as amended, are likely to occur and the sugar in the possession of the Defendants and each of them is likely to be disposed of before a hearing can be had and the action herein tried upon its merits and a permanent injunction issued thereon or before the Administrator of the Office of Price Administration can take final and effective administrative action to preserve or equitably distribute or dispose of such sugar." [Record pp. 19 and 20.]

The District Court also made the following conclusions of law among others:

"1. The action herein is brought pursuant to the provisions of Section 2(a)-6, Title 3, of the Second War Powers Act.

"2. Jurisdiction of this action and jurisdiction to issue the preliminary injunction herein lies within this Court, pursuant to the provisions of said Section 2(a)-6 of said Second War Powers Act.

"3. At all times pertinent hereto Third Revised Ration Order No. 3, as amended, issued pursuant to the provisions of Section 2(a), Title 3, of the Second War Powers Act, was and still is in effect." [Record p. 20.]

It is to be noted that the judgment for preliminary injunction was based upon the complaint and affidavits in support thereof and upon the finding of facts and conclusions of law heretofore referred to. [Record p. 22.]

Within thirty days from the entry and docketing of the judgment, the defendants appealed by filing notice of appeal on October 10, 1946.

Specification of Errors.

The District Court erred:

1. In its conclusion of law and in adjudging that at all times pertinent herein Third Revised Ration Order No. 3, as amended, issued pursuant to the provisions of Section 2(a)-Title 3 of the Second War Powers Act, as amended, was and still is in effect.

2. In its conclusion of law that Allen Ziegler, Raymond Ziegler and West Coast Supply Co., and each of them, violated Sections 15.7(d) and 22.10 of Third Revised Ration Order No. 3, as amended.

3. In its findings of fact that unless restrained and enjoined defendants and each of them threaten to and will

continue to issue sugar ration bank checks without having in their ration bank account a balance sufficient to cover the amount of such checks.

4. In its finding of fact that unless restrained and enjoined defendants and each of them threaten to and will use and dispose of and put beyond their possession and control sugar obtained by means of invalid sugar ration bank checks.

5. In its finding of fact that unless defendants and each of them are restrained and enjoined from issuing further sugar ration bank checks and from overdrawing their ration bank account or from using or permitting the use of or otherwise disposing of the sugar now subject to their order and control or in their possession, the general public will be denied its right to a proper allotment and proportion of the sugar available for general public consumption.

6. In its finding of fact that unless defendants are restrained and enjoined, further violations of Third Revised Ration Order No. 3, as amended, are likely to occur and the sugar in the possession of the defendants and each of them is likely to be disposed of before a hearing can be had and the action herein tried upon its merits and a permanent injunction issued thereon or before the Administrator of the Office of Price Administration can take final and effective administrative action to preserve or equitably distribute or dispose of such sugar.

7. In issuing a temporary injunction where the complaint and affidavits in support thereof fail to state a claim by which relief by way of injunction could be granted.

Questions Involved.

The principal questions involved herein are:

1. Was there a reasonable relationship amounting to due process of law between sugar rationing and the exercise of the war powers of Congress as of July 1, 1946, and thereafter?

2. Were the standards fixed by the Second War Powers Act of 1942, as amended, as prerequisite to the lawful exercise of the rationing power constitutionally satisfied in the functions of Third Revised Ration Order No. 3 on July 1, 1946, and thereafter, that is:

   (a) Was there a finding that sugar rationing was necessary "for fulfillment of requirements for the defense" of the United States as of July 1, 1946, and thereafter?

3. Could Third Revised Ration Order No. 3 be valid where there was in fact no showing of a sugar shortage in the United States as of July 1, 1946, and thereafter?

4. Were the provisions of Third Revised Ration Order No. 3 relating to the historical base for sugar allocations to industrial users including appellants, in such conflict with provisions of the War Mobilization and Reconversion Act as to render the provisions of Third Revised Ration Order No. 3 invalid as of July 1, 1946, and thereafter?

5. Were the provisions of Third Revised Ration Order No. 3 suspended from July 1, 1946, to July 25, 1946, during the suspension of the operation of the Emergency Price Control Act of 1942, as amended?

6. Was the injunction properly issued where there was no showing by plaintiff of impending or threatening acts on the part of defendants?

SUMMARY OF ARGUMENT.

A. The Provisions of Third Revised Ration Order No. 3, as Amended, Were Unconstitutional as of July, 1946, and Thereafter.

The provisions of Third Revised Ration Order No. 3, as amended, are predicated upon the authority of Section 2(a) of Title III of the Second War Powers Act, as amended. It is settled law that the latter Act may be constitutionally valid only in so far as it is a proper exercise of the war powers of Congress. It is likewise settled that in order for the said Act to be a proper exercise of war powers, there must be a reasonable relationship between such powers and the time of defendants' alleged act and the rationing of the particular commodity, sugar. Inasmuch as at the time of the defendants' alleged acts on July 1, 1946, and thereafter, the fighting part of World War II was over and since at such time there was no showing of need for nor in fact was there any need for allocation of any commodities for the *defense* of the United States, there was no basis for the exercise of war powers per the instrument of sugar rationing as of that time and thereafter, and hence the provisions of Third Revised Ration Order No. 3, as amended, were as of July 1, 1946, and thereafter, unconstitutional in that such provisions violated the Fifth Amendment of the Constitution of the United States.

B. The District Court Erred in Finding That as of July, 1946, and Thereafter, Third Revised Ration Order No. 3 Was in Effect.

I. The said order was invalid as of the stated times because the order fixed a historical base for the allocation of sugar to the defendants as industrial users and the fixing of such a base was in conflict of Section 203 of the War Mobilization and Reconversion Act of 1944, providing that production of materials should not be made dependent upon the existence of a concern or the functioning of a concern in a given field of activity at a given time.

II. The said order was invalid as of the said times because in the year 1946, as apparent from public reports, from the U. S. Department of Agriculture, U. S. Department of Commerce, and of Trade Journals reports, there was no sugar shortage in the United States.

III. Inasmuch as Third Revised Rational Order No. 3, as amended, was issued by the Office of Price Administration pursuant to the authority of the Second War Powers Act of 1942, as qualified by the Emergency Price Control Act of 1942, as amended, and since the Emergency Price Control Act was suspended during the period of July 1, 1946, to July 25, 1946, the provisions of Third Revised Ration Order No. 3 were likewise suspended during that time—time within which all of appellants' alleged acts may have taken place.

C. The District Court Erred in Granting the Preliminary Injunction in the Absence of the Showing of Impending or Threatening Action on the Part of the Defendants.

Preliminary injunctions have always been denied in the absence of impending or threatening action on the part of the defendants. The function of the process of injunction is to provide against future wrongs rather than to punish for past offenses. Defendants' acts herein were closely spaced during a period when there was doubt as to the continued existence of rationing and such actions were discontinued following the revival of the new Office of Price Administration. No previous or subsequent violations were asserted. Except for conclusions of fact therefore, there was no showing of impending or threatening actions on the part of defendants, and hence, the preliminary injunction should have been denied.

ARGUMENT.

Introductory Statement.

This case brings before the Court of Appeals some new questions, some old ones.

The new questions are of particular importance because they challenge the constitutionality of rationing regulations as applied to an economy which is not at war and not at peace. They specifically challenge the constitutionality of the regulations by the test tube of the due process requirements of the Fifth Amendment to the Constitution of the United States.

The appellants are in the position of a typical small business attempting to gain a foothold in the peacetime economy which is emerging from the nearly defunct economy of war. Whether sugar rationing was reasonably related to the war powers of Congress as of July 1, 1946,—whether Third Revised Ration Order No. 3, as amended, could on any theory be valid in the light of its historical base for sugar allocation—in direct conflict with provisions of the War Mobilization and Reconversion Act of 1944—whether sugar rationing can be valid if there is no showing of a sugar shortage—where on the contrary public records and reports indicate no shortage whatever—these are questions affecting not only the appellants, but all private business in the United States in these times.

The broader issues—as to how long under the guise of war powers, the Government can imprison private business within the trackless maze of administrative regula-

tions; as to whether Government can feed its chosen foreign policies through the instrument of sugar rationing, are issues implicit in the determination of this case.

It is respectfully submitted that the constitutional validity of Third Revised Ration Order No. 3, as amended, upon which the temporary injunction issued in this case depends, should be determined in the setting of the economic facts of American life as those facts existed on July 1, 1946, and thereafter—not in the setting of the shooting war of December, 1941 to August, 1945.

As for the old questions—they are ones which concern appellants alone.

It is the position of appellants that the District Court had before it no facts, assuming as we must that the allegations of the complaint were true and of the affidavits in support thereof, to warrant the said Court to issue a temporary injunction, for there was no showing of impending or threatened acts on the part of the defendants. And this as the cited decisions indicate has historically been a strict requirement for the issuance of a temporary injunction.

In this connection, it may also be noted that the amount of sugar herein involved has no relevance whatever to the questions whether impending or threatening acts were shown.

A. The Provisions of Third Revised Ration Order No. 3, as Amended, Were Void and of No Effect at the Time of Defendant's Alleged Acts and Thereafter.

I. There Was No Reasonable Relationship Between the Exercise of War Power and the Rationing of Sugar as of the Time of Defendants' Alleged Acts and Thereafter.

The constitutional validity of the sugar rationing program and specifically of Third Revised Ration Order No. 3, issued by the Office of Price Administration must be sustained if at all on the basis of the exercise of the war powers of Congress through the delegation of rationing power to the President under the Second War Powers Act. Unless so justified the said ration order must be invalid in violation of due process within the meaning of the Fifth Amendment of the Constitution of the United States.

See:

O'Neal v. U. S., 140 F. (2d) 908 (6 Cir. 1944):

Sec. 2(a)-6 of Title III, Second War Powers Act, as amended, 56 Stat. 176, 50 U. S. C. App., Sec. 631, *et seq.;*

Third Revised Ration Order No. 3, 11 Fed. Reg. 134 *et seq.;*

U. S. Const., Art 1, Sec. 8.

Assuming that the sugar rationing program was created and administered through the war powers of Congress, there must be a reasonable relationship between the rationing of sugar and the exercise of such war powers

at the time defendants' acts took place and thereafter to satisfy the due process requirement of the Fifth Amendment of the Constitution.

It is axiomatic that in the exercise of all of the powers granted to it under the Constitution, Congress must find a reasonable relationship between the particular power and the acts done under the authority of such power.

So at various times the Supreme Court of the United States has found that Congress attempted to exercise a power in a manner not reasonably related to the nature of the power.[1]

The Supreme Court has also held that a regulation may be created under a state of facts wherein Congress may have a reasonable basis for exercise of a power, but that later through a change in facts, the exercise of the power may no longer be reasonable, and hence, the regulation originally valid becomes unconstitutional.

In *Chastleton Corp., et al. v. Sinclair, et al.,* 264 U. S. 543 (1924), Justice Holmes found that a Rent Act enacted in the District of Columbia in 1921 and later extended in 1922, might, although originally valid, because

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[1]See:

Railroad Retirement Board, et al. v. Alton R. R., 295 U. S. 330 (1935), in which the Railroad Retirement Act of June 27, 1934, was held unconstitutional in that various sections of the Act were not reasonable exercise of the power of Congress to regulate interstate commerce;

U. S. v. Butler, et al., 297 U. S. 1 (1936). The Agricultural Adjustment Act of May 12, 1933, was declared unconstitutional as an unreasonable exercise of the tax powers of Congress.

of the war emergency, become invalid because of a change in housing conditions. Justice Holmes said at page 547:

> ". . . a law depending upon the existence of an emergency, or other state of facts to uphold it, may cease to operate after the emergency ceases, or the facts change, even though valid when passed." (Citing cases.)

See also:

Perrin v. U. S., 232 U. S. 478 (1914);

Newton v. Consolidated Gas Co., 258 U. S. 165 (1922);

George B. Newton Coal Co. v. Davis, 281 Penn. St. Rep. 74 (1924), 126 Atl. 192.

During the fighting part of the recent war, the courts may well have taken judicial notice that all food commodities were in short supply, and that rationing, *per se,* of any food was authorized under the war powers of Congress, as delegated under the Second War Powers Act. Drastic administrative control was obviously necessary "in the public interest and to promote the national defense."

J. P. Steuart & Bro. v. Bowles, 332 U. S. 398, 64 S. C. 1097 (1944);

Henderson v. Bryan (D. C. Cal., 1942), 46 Fed. Supp. 682.

As of July 1, 1946, and thereafter, the time of defendants' alleged acts, the fighting war had been over for nearly a year. The demobilization process was well under way. It is a matter of common knowledge that the need for food commodities such as sugar was only a frac-

tional part of the requirements for such commodity during the fighting part of the war and the immediate months following the surrender of our enemies. By July, 1946, many executive war agencies in the office of the President similar to the Office of Price Administration had been terminated by the President in recognition of the fact that such agencies were no longer useful for war purposes.[2]

The duration of war powers themselves is indefinite and fixes no clear standard. Following the First World War, there were three separate periods when the war allegedly ended, so that even now it is not possible to know when, for constitutional purposes, the war powers of Congress came to an end during the First World War.

See:

Hudson, *The Duration of The War Between the United States and Germany,* 39 Harvard Law Rev., 1020 at 1045 (1926).

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[2]Among the agencies terminated were:

Office of War Information, terminated Sept. 15, 1945 (Executive Order 9608, Aug. 31, 1945, 10 Fed. Reg. 11223).

War Refugee Board, terminated Sept. 14, 1945 (Executive Order 9614, Sept. 14, 1945, 10 Fed. Reg. 11789).

Office of Strategic Services and the Inter-intelligence Service, terminated Dec. 31, 1945 (Executive Order 9621, Sept. 21, 1945, 10 Fed. Reg. 12033).

Office of Fishery Coordination, terminated Oct. 30, 1945 (Executive Order 9649, Oct. 30, 1945, 10 Fed. Reg. 13431).

Office of Censorship, terminated Nov. 15, 1945 (Executive Order 9631, Sept. 28, 1945, 10 Fed. Reg. 12304).

War Relocation Authority, terminated June 30, 1946 (Executive Order 9742, June 30, 1946, 11 Fed. Reg. 7125).

Office of Civilian Defense, terminated June 5, 1945 (Executive Order 9562, June 5, 1945, 10 Fed. Reg. 6639).

It has often been expressed according to an old fiction of international law, that the war powers last until treaties of peace are concluded.[3]

Since treaties have not been concluded as yet following World War II and there is no immediate prospect of their being concluded, it is obvious that we cannot justify the continued exercise of sugar rationing on the theory that it may last as long as the war, that is, until treaties are concluded. If this were so, there would be no meaning to the limitations placed in the Second War Powers Act, or of the Constitutional requirement of due process of the Fifth Amendment, that in the exercise of the war powers, as in all its powers, there must be a reasonable relationship between the exercise of such powers and rationing of a particular commodity.

It is submitted that in the instant case the Court erred in failing to examine the changed conditions of the war status of the United States, as of July 1, 1946, and thereafter in issuing the temporary injunction in this case. Further, that the changed conditions in the war economy in the United States following the surrender of our enemies cut off the reasonable relationship between the war powers and sugar rationing on which Third Revised Order No. 3 was based, at least as of July 1, 1946, and thereafter.

Chastleton Corp., et al, v. Sinclair, et al, 264 U. S. 543;

Newton v. Consolidated Gas, 258 U. S. 165;

Perrin v. U. S., 232 U. S. 478.

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3 *Ware v. Hylton,* 3 Dall. 198, at 236 (1796);
Hijo v. U. S., 194 U. S. 315 (1904).

II. Tested by the Legislative Standard Fixed by the Second War Powers Act as a Prerequisite to Presidential Exercise of the Power to Ration, Third Revised Ration Order No. 3 Was Invalid as of the Time of Defendants' Alleged Acts and Thereafter.

In the delegation to the President of its power to ration, Congress prescribed a specific condition as a prerequisite to the exercise of rationing by the President. The Second War Powers Act provides in part,

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material, or of any facilities for defense . . . the President may allocate . . ."
>
> Ch. 199, Title III, Sec. 301(2);
>
> 56 Stat. 177;
>
> 50 U. S. Code, Sec. 333, sub-sec. 2(a)(2).

The President then has no power to ration unless he finds that the fulfillment of the requirements for the defense of the United States will result in a shortage.

See:

O'Neal v. U. S., 140 F. (2d) 908, Cir. 1944.

There were no facts before the District Court, either as alleged in the complaint or in the affidavits in support thereof that as of the time of defendants' alleged acts on July 1, 1946, and thereafter, there were in fact any requirements for sugar to be used "for the defense" of the United States.

Third Revised Ration Order No. 3, as amended, nowhere makes reference to any requirements for sugar for the defense of the United States. In Executive Order 9745 of June 30, 1946 (11 Fed. Reg. 7327), in which he

purports to continue the functions among others of the O.P.A. which had been delegated to that agency by the Second War Powers Act, as amended, the President makes no reference to the fulfillment of requirements for the defense of the United States.

Similarly, the Act extending the Second War Powers Act, as amended, to March 30, 1947, is silent to this point.

Act of June 29, 1946, Chap. 526, Sec. 1;
60 Stat. Sec. 345;
50 U. S. C. App. 645.

It is submitted that in view of the war status of the nation as of July 1, 1946, nearly a year after the actual cessation of hostilities, there could be no possible finding by the President nor by any administrative agency, that the fulfillment of requirements for the *defense* of the United States required sugar rationing.

It is submitted that the term "defense" as used in the Second War Powers Act, *supra,* is limited by the general concept of war powers under which the act found its constitutional validity and hence meant defense in the sense of defense against enemies.

The existence of a national economic emergency following the war or of a sugar shortage is not alone sufficient for the exercise of rationing powers as war powers.

Ex parte Milligan, 4 Wall, 2 (1866);
Panama Refining Co. et al, v. Ryan, 293 U. S. 388 (1935);
Home Building & Loan v. Blaisdell, et al, 290 U. S. 398 (1934);
U. S. v. L. Cohen Grocery Company, 255 U. S. 81 (1921).

And when a war power statute limits the delegation of such powers to a specific condition as did the Second War Powers Act, as amended, and further when there can be no showing that such condition or finding can be satisfied, the statute then becomes invalid as lacking in due process within the meaning of the Fifth Amendment of the Constitution.

Appellants herein against whom the preliminary injunction below was issued, were deprived of the use of and the right to the disposition of their property, sugar [Record, p. 23], and since the said injunction was based on an invalid ration order appellants were deprived of their property without due process of law.

B. The Provisions of Third Revised Ration Order No. 3, Were Invalid and Were Not in Effect as of July 1, 1946, and Thereafter.

I. Third Revised Ration Order No. 3 Was Itself Invalid as of July 1, 1946, and Thereafter, Because of Conflict With Provisions of the War Mobilization and Reconversion Act.

Although the Record does not disclose the fact that appellees herein were industrial users of sugar, the complaint refers to appellees herein as wholesalers within the meaning of Third Revised Ration Order No. 3. [Record, p. 3.]

From the provisions of Third Revised Ration Order No. 3, it is clear that as "wholesalers," appellants were subject as industrial users to the provisions of Third Revised Ration Order No. 3.

The District Court in its findings of fact stated that defendants were subject to the provisions of Third Re-

vised Ration Order No. 3 [Record, p. 18] and on the basis of a finding that defendants had violated certain provisions of Third Revised Ration Order No. 3, the District Court issued a temporary injunction in this case. [Record, pp. 22 and 23.]

It was decreed that the preliminary injunction *inter alia,* that the defendants were restrained and enjoined from "violating any and all of the provisions of Third Revised Ration Order No. 3 as heretofore and hereafter amended." [Record, p. 23.]

Third Revised Ration Order No. 3, provides, among other things that the base period use or base for allocations of sugar to industrial users shall be determined by the amount of sugar used in certain periods during the year 1941.

> *Third Revised Ration Order No. 3,* Sec. 2.1(e), 11 Fed. Reg. 137.

If the industrial user did not use sugar during each month in 1941 such user was permitted to have his base for allocation determined by sugar used at his establishment from January 1, 1941, to April 27, 1942. (Third Revised Ration Order No. 3, Sec. 2.1(2), 11 Fed. Reg. 137.)

Unless an industrial user qualified according to the regulations for the base period of 1941 or in the alternative for the period January 1, 1941 to April 27, 1942, such users as of July 1, 1946 and thereafter could not obtain sugar as industrial users in the same quantities as those qualifying under the base period.

These provisions of Third Revised Ration Order No. 3 which affected defendants as industrial users were in

direct conflict with Section 203 of the War Mobilization and Reconversion Act of October 3, 1944, Chap. 480, Title III, 58 Stat. 787, which provides in part as follows:

> ". . . the executive agencies exercising control over manpower, production, or materials shall permit the expansion, resumption, or initiation of production for nonwar use whenever such production does not require materials, components, facilities or labor needed for war purposes, or will not otherwise adversely affect or interfere with the production for war purposes. Such production for nonwar use shall be permitted regardless of whether one or more competitors normally engaged in the same type of production are still engaged in the performance under any contract which is needed for the prosecution of the war, and shall not be made dependent upon the existence of a concern or the functioning of a concern in a given field of activity at a given time; . . ."

By the War Mobilization and Reconversion Act Congress stated its legislative policy that as to the production of materials of any kind for nonwar use discrimination should not be made against a concern on the basis of its failure to be in business at any particular time. By its very terms the above provision of Third Revised Ration Order No. 3 in fixing a sugar base for industrial users on the basis of their 1941 output violated the said provisions of the War Mobilization and Reconversion Act and hence such provisions of the Third Revised Ration Order No. 3 by which these defendants were affected were invalid. Hence the temporary injunction based upon an alleged violation of sections of Third Revised Ration

Order No. 3 by an industrial user or wholesaler, was itself invalid.

> *Moberly Milk Products Co. v. Fleming.* D. C., D. C., 15 U. S. Law Week 2419 (affd. U. S. Ct. App., D. C., 2-14-47).

In the *Moberly* case, an injunction against enforcement of the provisions of Third Revised Ration Order No. 3 was issued on behalf of the plaintiff Milk Products Company on the ground that the historical base for sugar allocation in the said ration order was in conflict with the provisions of the War Mobilization and Reconversion Act of 1944, cited above. Justice Letts stated:

> "The Congress saw fit to encourage small enterprises and new plants and to protect same in the expansion and initiation of products for non-war use. To further such Congressional purpose statutory safeguards were set up to protect small plants and new concerns from discriminatory use of historical use bases for any purposes in ration orders."
>
> *Moberly Milk Products Company v. Fleming,* D. D., D. C., 15 U. S. Law Week, 2419 (affd. U. S. Ct. App. D. C., Feb. 14, 1947).

II. Third Revised Ration Order No. 3 Was Invalid as of July 1, 1946, and Thereafter, Because There Was No Sugar Shortage in the United States at Such Time.

Aside from the legislative standard that there must be a finding by the President that the fulfillment of the requirements of the United States will result in a shortage of a particular commodity during a period in order that rationing may be in valid exercise of war powers, there is the self evident broader proposition that if no sugar

shortage in the United States in fact existed as of July 1, 1946 and thereafter, there could be no reasonable basis of the exercise of the rationing power and hence the provision of Third Revised Ration Order No. 3 were applicable and not in effect at such time.

See:

Panama Refining Co. v. Ryan, supra;
O'Neal v. U. S., supra;
Chastleton v. Sinclair Oil Co., supra.

From public reports, specifically reports of the U. S. Department of Agriculture and U. S. Department of Commerce and from Trade Journals, it is apparent that there was no shortage of sugar in the United States as of July 1, 1946, and thereafter; on the contrary, it is apparent from such public reports on the available sugar supply during the year 1946 and from public reports on the estimated United States consumption of sugar by civilian and military use that a sufficient sugar supply existed in the United States during the year 1946 to meet the normal sugar needs of the entire population of the United States and that unless United States controlled Cuban sugar had been allocated to foreign countries in 1946, sufficient sugar to fill the needs of the entire population would have been available for disposal to the people of the United States.

TABLE NO. 1

Available Supply of Sugar for Consumption in United States, 1946.

	Short Tons Total		Pounds Per Capita	
	Raw	Refined	Raw[5]	Refined
Requirements*	7,173,860	6,708,115	103.2**	96.5[6]
Actual Consumption	5,645,913	5,276,554[7]	81.2	75.9
Deficit	1,527,947	1,431,561	22.0	20.6
U. S. Controlled Cuban sugar allocated to other countries	1,619,000[8]	1,513,084	23.3	21.8
If added to actual consumption	5,645,913	5,276,554	81.2	75.9
	7,264,913	6,789,638	104.5	97.7
1946 U. S. Exports	405,000[9]	378,505		
1935-39 U. S. Exports	92,489[10]	86,438		
Excess over Pre-war	312,511	292,067	4.5	4.2
If added to U. S. Consumption and U. S. controlled Cuban sugar	7,264,913	6,789,638	104.5	97.7
	7,577,424	7,081,705	109.0	101.9

*Based on 1935-39 average per capita consumption of 96.5 pounds of refined sugar for a population of 139,028,300.[11]

**Converted on basis of 1.07 pounds of raw sugar equals one pound refined sugar.

Source of Data:

[5]Basis for Conversion from refined to raw in 1945 Agricultural Statistics, Bureau of Agricultural Economics, U. S. D. A., p. 93.

[6]The National Food Situation, Bureau of Agricultural Economics, U. S. D. A., Sept. 1946, p. 7.

[7]Weekly Statistical Sugar Trade Journal (Willett and Gray, 140 Front St., New York 5), Jan. 23, 1947, p. 37.

[8]Industry Report Sugar, Molasses and Confectionery, Office of Domestic Commerce, Fats, Foods and Oils Section, Bureau of Foreign and Domestic Commerce, U. S. Deuartment of Commerce, Dec. 1946, p. 6.

[9]Same as [8] above. Aug. 1946, p. 15.

[10]Same as [7] above, p. 39.

[11]Calculated by dividing U. S. Dept. of Agriculture estimated 1946 per capital consumption 72.6 pounds (same source as 5 above) into 5,400,000 tons, the estimated consumption for 1946 (same as [9] above, p. 18).

TABLE No. 2.

Sugar, raw value equivalent: Estimated United consumption by civilians, and use by military and war services (units of 1,000 tons)

Calendar Year	Type of Use		
	Civilian	Other	Total
1935	6,602	139	6,741
1936	6,703	80	6,783
1937	6,642	93	6,735
1938	6,645	83	6,728
1939	6,908	150	7,058
1940	6,763	195	6,958
1941	7,350	189	7,539
1942	6,102	663	6,765
1943	5,569	1,226	6,795
1944	6,158	1,355	7,513
1945	5,092	1,053	6,045
1946[12]	5,400	165	5,565

[12]Preliminary estimate.

Source of Data:

1935-44, Agricultural Outlook Charges, 1946, Bureau of Agricultural Economics, U. S. D. A., Dec. 1945, p. 110.

1945-46, "Industry Report Sugar, Molasses and Confectionery," Prepared by George F. Dudik, Office of Domestic Commerce, Foods, Fats and Oils Section, December 1946, U. S. Department of Commerce, Bureau of Foreign and Domestic Commerce, Washington 25, D. C., p. 18.

Congress had no power to delegate authority to the President under the Second War Powers Act or otherwise to distribute American sugar to foreign countries in furtherance of the war powers of Congress.

Compare:

U. S. v. L. Cohen Grocery Company, supra.

On the contrary, the rationing authority is limited by the Second War Powers Act to needs for the "defense of the United States."

In view of the fact that public reports demonstrate that there was sufficient sugar in the United States during the year 1946 for the needs of the whole population, there was no basis for the exercise of the rationing power at least as of July 1, 1946, and thereafter, and hence the provisions of Third Revised Ration Order No. 3 were invalid as of such times.

III. The Provisions of Third Revised Rational Order No. 3 Were Invalid at the Time of Defendants' Alleged Violations in That Saving Provisions Under the Emergency Price Control Act of 1942, as Amended, as to Acts Done Between July 1, 1946 and July 25, 1946 Apply to Third Revised Ration Order No. 3.

The District Court found as a Conclusion of Law that the provisions of Third Revised Ration Order No. 3 were in force and effect as of the time of the alleged acts of the appellants complained of. [Record, p. 20.]

The specific dates on which appellants' acts in violation of the said order occurred are not set forth in the complaint, nor on the verified affidavits filed in support thereof [Record, pp. 2-6, 8-13]; nor do such dates appear at any place in the Record.

The complaint and affidavits generally state that between July 11, 1946, and August 7, 1946, appellants did draw and issue and use in payment for sugar certain ration checks. [Record, p. 4.] There are no allegations as to exactly when appellants drew such checks.

It is a matter of law and of judicial knowledge that between July 1, 1946, and July 25, 1946, the Emergency Price Control Act of 1942 and the Regulations promulgated thereunder were no longer in force and effect. The Emergency Price Control Act of 1942 expired by its own terms on June 30, 1946. The President vetoed the first new price bill and did not sign the present one extending the Emergency Price Control Act of 1942 until July 25, 1946.

The position of appellants is that the Office of Price Administration issued Third Revised Ration Order No. 3 under authority of the Second War Powers Act as limited by the Emergency Price Control Act; that in view of the provisions of the Emergency Price Control Act hereinafter cited, the rationing authority of the OPA was subject to the same suspension or hiatus period between July 1 and July 25, 1946, as was price control, or as was any other administrative function of the Office of Price Administration.

If this is so, the failure of appellees to allege in the complaint, or to state in the affidavits attached thereto, any fact showing any acts in violation of Third Revised Ration Order No. 3 by these appellants, after July 25, 1946, and before July 1, 1946, failed to state a claim upon which injunctive relief could be granted.

The power to ration was allegedly delegated by Congress to the President by the Act of June 28, 1940, Ch. 440, 54 Stat. 676, 50 U. S. C. App. 1152(a)(2) which provided in part:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any

material or of any facilities for the defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The only power of Congress to enact such legislation must have been derived from the war powers of Congress.

O'Neal v. U. S. (C. C. A., Tenn., 1944), 140 F. (2d) 908, Cert. Den. 64 S. Ct. 945;

Perkins v. Brown (D. C., Ga., 1943), 53 Fed. Supp. 176;

U. S. v. Beit Bros. (D. C., Conn., 1943), 50 Fed. Supp. 590;

Henderson v. Bryan (D. C., Cal., 1942), 46 Fed. Supp. 682.

By Executive Orders, the President created the Office of Price Administration as a sub-agency of the War Production Board, and had conferred on the Office of Price Administration the administration of rationing before the creation of the Office of Price Administration under the Emergency Price Control Act of 1942.

O'Neal v. U. S., supra.

But Congress, in whom the rationing power was originally vested an exercise of war power, and who had originally doled out that function, among others, to the President through the Act of June 28, 1940, then gave legislative birth to the Office of Price Administration by the Emergency Price Control Act of 1942.

Act of Jan. 30, 1942, C. 26, 56 Stat. 23; 50 U. S. C. App. 901, *et seq.*

This Act provided in part as follows:

> "There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator . . ." (50 U. S. C. App. 921(a).)

The Act further provided:

> ". . . The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the government with respect to any particular commodity or commodities . . ." (50 U. S C. App. Sec. 921(b).)

The previous exercise of the rationing function by the OPA was thus merged with the price functions authorized by the Emergency Price Control Act of 1942. From thenceforth, the OPA administered rationing under specific Congressional authorization.

O'Neal v. U. S., supra.

Shortly after the enactment of the Emergency Price Control Act of 1942, Congress revised the Act of June 28, 1940, carrying over the rationing provision previously set out, in what was known as the Second War Powers Act.

> Act of March 27, 1942, T III, Sec. 301, 56 Stat. 177; 50 U. S. C. App. 633, Sec. 2(a)(2).

This Act added nothing to nor subtracted nothing from the rationing provisions of the Act of June 28, 1940, and the Emergency Price Control Act of 1942.

Through subsequent changes, the rationing clause in Section 921(b) of the Emergency Price Control Act, remained.

In accordance with the provisions of Section 901 of the same Act, however, all of the regulations, orders, price schedules and requirements thereunder, expired on June 30, 1946.

Hence, Congress expressed its intent to include the rationing authority of the OPA to be suspended, along with the rest of the authority of OPA, from July 1, to July 25, 1946; and that period of refuge is as available to appellants in this case to the same extent as if this were a price control case.

It is settled that during the period from July 1, 1946, to July 25, 1946, neither civil nor criminal violations of the Emergency Price Control Act of 1942, as amended, were possible.

U. S. v. Auerbach (D. C., S. D., Cal., 1947), 68 Fed. Supp. 776.

See, also:

Porter v. Shibe, 158 F. (2d) 68.

C. The District Court Erred in Issuing the Temporary Injunction Because There Was No Showing of Impending or Threatened Acts on the Part of the Defendants.

The issuance of a temporary injunction is a drastic remedy and should not be exercised by the court unless the right to relief is clear.

Milliken v. Stone, 16 F. (2d) 981 (2d Cir., 1927).

In keeping with this principle, the courts have required a showing that action by defendants sought to be enjoined is impending or threatened before they will grant injunctive relief. The showing in the complaint must be real and definite.

Alexander v. DeWitt (C. C. A. 9, 1944), 141 F. (2d) 573, 577;

U. S. v. William S. Gray Co., 59 F. Supp. 665 (D. C., S. D., N. Y., 1945);

S. E. C. v. Electric Bond & Share Co., 18 F. Supp. 131, 148 (D. C., N. Y., 1937);

Bowles v. Shellhamer, et al., 61 Fed. Supp. 465 (D. C., Dela. 1945).

The complaint for injunction alleges that between July 11, 1946, and August 7, 1946, the defendants did draw and issue and use in payment for sugar, four checks totaling 1,370,000 pounds. Further, that the defendants did not make deposits in their ration bank account to cover such checks, and that the sugar ration bank account of defendants, was as of the date of the complaint, overdrawn in the amount of 1,346,804 pounds. [Record, p. 4.] There is the further allegation that unless the defendants are restrained from issuing further sugar ra-

tion banking checks that the general public would be denied its right to the proper allotment and portion of sugar available for public consumption. [Record, p. 5.]

In support of the above allegations there is no showing in the affidavits in support of the temporary restraining order and order to show cause for a preliminary injunction that the defendants or any of them threatened to continue drawing and issuing sugar checks. There is merely the allegation that unless defendants are restrained that the rationing program for sugar would be imperiled. [Record, p. 10.]

In the order to show cause, however, the court stated:

> ". . . and it further appearing that violations are likely to occur . . ." [Record, p. 14.]

There are wholly gratuitous statements in the Court's interlocutory findings of fact to the effect that unless restrained and enjoined the defendants would continue to issue sugar ration bank checks without having in their ration bank account a balance sufficient to cover the amount of such checks. [Record, p. 19.]

The Court may take judicial notice of the fact that during the larger part of the period when defendants' acts are alleged to have taken place, that is, between July 11, 1946, and August 7, 1946, the Emergency Price Control Act was not in effect; it had lapsed on June 30, 1946, and was revived on July 25, 1946.

There is no clear showing in the complaint, nor in the affidavits attached thereto, as to exactly on what days or dates the defendants' acts took place and it may be assumed for the purpose of this discussion that all defendants' acts took place within the period in July, 1946, in which the OPA was temporarily not in existence. To put it obliquely, there is no showing in the complaint nor in the affidavits, that defendants committed any act whatever before July 1, 1946, nor after July 25, 1946.

If then there is to be any finding that the defendants were likely to issue further checks against their ration bank account for which there was no sufficient balance, such finding must be based on the acts done during the period when the Emergency Price Control Act was not in existence and when price, rent and other controls were suspended.

In spite of the volume of sugar involved in this case, there can, it is submitted, be no reasonable inference from the facts alleged in the complaint, and supported by the affidavits attached hereto, that defendants would continue issuing invalid sugar ration bank checks. On the contrary, the inference would appear to be that the defendants, during a period when the Emergency Price Control Act was no longer in existence, during a period when controls generally were in a state of hiatus, obtained certain amounts of sugar through invalid ration checks, and confined their activities to that period of hiatus, neither before nor afterwards issuing any invalid sugar ration checks.

The courts have always held that not only must injunctive relief be denied unless there is an eminent threat, but the eminence of the defendants' threatened acts must be alleged with specificity.

New Jersey v. Sargent, 269 U. S. 328, 338-339 (1926);

N. Y. v. Ill., 274 U. S. 488, 489 (1927);

Conn v. Mass., 282 U. S. 660, 674 (1931);

Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 285 (1909);

Hogeman Farms Corp. v. Baldwin, 293 U. S. 163, 170 (1934);

Cruikshank v. Bidwell, 176 U. S. 73, 81 (1900);

E. I. Dupont de Nemours & Co. v. Boland, 85 F. (2d) 12 (C. C. A. 2, 1936);

Universal Rim Co. v. G. M. C., 31 F. (2d) 969, 970 (C. C. A. 6, 1929);

U. S. v. Hart-Carter Co., 63 Fed. Supp. 982;

High, Injunctions (4th Ed. 1905), Sec. 34.

There has been no allegation of facts in the complaint, nor do the affidavits indicate any facts which show that defendants threatened, after the particular acts complained of during the stated period of July 11, to August 6, 1946, to continue drawing invalid sugar ration checks. On the contrary there are merely conclusions set forth in the findings of fact that defendants threatened to continue issuing such invalid ration bank checks. [Record, p. 19.]

The rules relating to the granting of injunctive relief have been followed in cases arising out of the rationing and price control programs, and the courts have uniformly

held that where there is no showing of threat or intent by defendants to operate in the future in violation of the price regulations an injunction must be denied.

Bowles v. Minish (D. C., Ala., 1944), 56 Fed. Supp. 153;

Bowles v. Jones & Laughlin Steel Corp. (D. C., Ala., 1944), 54 Fed. Supp. 1006;

Bowles v. Rugg (D. C., Ohio, 1944), 57 Fed. Supp. 116;

Bowles v. Arlington Furniture Co. (C. C. A. 7, 1945), 148 F. (2d) 467;

Bowles v. Huff (C. C. A., Cal. 1944), 146 F. (2d) 428.

Conclusion.

It is respectfully submitted that the District Court erred in its findings of fact and conclusions of law as stated in the within Specification of Errors; that as of July 1, 1946, and thereafter, the provisions of Third Revised Ration Order No. 3, as amended, were invalid and were unconstitutional in violation of the Fifth Amendment to the Constitution of the United States; further, that as there was no showing of impending or threatening acts on the part of defendants, the temporary injunction should not have issued.

Wherefore, appellants respectfully pray that the temporary injunction be dissolved and set aside.

Respectfully submitted,

LAZARUS AND HORGAN,
By PATRICK D. HORGAN,
Attorneys for Appellants.

APPENDIX.

SECOND WAR POWERS ACT OF 1942, AS AMENDED.

Section 2(a)(2) of the Second War Powers Act of 1942, as amended (Act of March 27, 1942, Chap. 199, Title III, Sec. 301, 56 Stat. 177), provides as follows:

"(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

"(A) Contracts or orders for the government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled 'An Act to promote the defense of the United States' (Title 22, §411 *et seq.*);

"(B) Contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States;

"(C) Subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this subsection (a).

Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order; and the President may require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority. *Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a short-*

age in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. (Emphasis added.)

Section 2(a)(6) of the same Statute provides in part as follows:

"(6) The District Courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States and the courts of the Phillippine Islands shall have jurisdiction of violations of this subsection (a) or any rule, regulation or order or subpoena thereunder, whether heretofore or hereafter issued, and of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpoena thereunder heretofore or hereafter issued . . ."

EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED.

Section 104 of the Emergency Price Control Act of 1942, as amended, June 30, 1944, Chap. 325, Title I, 58 Stat. 637, 50 U. S. Appendix 921, provides in part as follows:

"(a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of

$12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended (Title 5, §§661-673, 674). The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local or other agencies, and utilize and establish such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency."

Section B of the same Statute provides as follows:

"(b) The principal office of the Administrator shall be in the district of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. *The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administraton with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities;* . . ." (Emphasis added.)

THIRD REVISED RATION ORDER NO. 3, AS AMENDED.

Third Revised Ration Order No. 3, as amended, 11 Fed. Reg. 134 through 165, provides in part as follows:

Section 15.7(d) (page 153):

"(d) Overdrafts prohibited. No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account."

Section 22.10 provides as follows (page 164):

"Unlawful use or possession. No person shall at any time either use or have in possession or under his control or take delivery of any sugar, checks, coupons, stamps or ration books, where such possession, control, or acquisition is in violation of this order."

Article II—Industrial Users, provides in part as follows (page 137):

"Section 2.1(e). Industrial users were required to report their use of sugar during certain quarterly periods—(Base-period use or Base). (1) As a part of his reregistration, an industrial user whose industrial user establishment is already registered under Rationing Order No. 3 was required to report, on Schedule II of OPA Form R-1200, the total number of pounds of sugar of which he made an industrial use (other than those for which he was entitled to receive a provisional allowance) at his industrial user establishment during 1941. The

report showed the amount he used during each of the following quarters in 1941:

First quarter, January to March, inclusive.

Second quarter, April to June, inclusive.

Third quarter, July to September, inclusive.

Fourth quarter, October to December, inclusive.

(2) If his industrial user establishment did not use sugar during each month in 1941, the industrial user was permitted to divide the total amount used at his industrial user establishment from January 1, 1941 to April 27, 1942, inclusive, by the number of months in which he was in operation during that period. In making that computation, the industrial user treated as a full month any calendar month in which he was in operation at least sixteen days. Any month in which he was in operation for less than sixteen days was treated for this purpose as a fraction of a month. This figure was multiplied by three and the result was treated as the amount used during each quarter. (For example, if the industrial user first used sugar on November 17, 1941, he was deemed to have been in business for 5-14/30 months; accordingly, if he used 1,000 pounds of sugar from November 17, 1941 to April 27, 1942, inclusive, his sugar use would be, for each month in his base period, 1.000 divided by 5-14/30, or 183 pounds, and for each quarter 183 times 3 or 549 pounds.)

Section 2.2. Industrial user allotments—(a) General. To enable an industrial user to get and use sugar at his industrial user establishment, he is given an allotment for each use or product for which he has established a base-period use in accordance with this order. Allotments

are given for fixed periods called allotment periods. The allotment periods are the following quarterly periods:

(1) First quarter: January to March, inclusive;

(2) Second quarter: April to June, inclusive;

(3) Third quarter: July to September, inclusive;

(4) Fourth quarter: October to December, inclusive.

(b) Application for allotments. Application for any allotments must be made, in person or by mail, to the District Office with which his establishment is registered on OPA Form R-1230. The application must be made not more than fifteen days before, nor more than five days after, the beginning of the period. However, the District Office may permit an application to be made at any time before an allotment period under such circumstances as the Washington Office of the Office of Price Administration may direct. The District Office, in its discretion, may also permit an application to be made at any time within the allotment period, but if it is made more than five days after the beginning of the period, the industrial user's allotment shall be reduced by an amount which bears the same proportion to the allotment as the number of days which have lapsed from the start of the period bears to the total number of days in the period.

(c) Amount of allotment. The amount of an allotment of an industrial user is determined on the basis of his use of sugar at his industrial user establishment during the quarter in the base period corresponding to the allotment period. The amount of sugar used by him during the

quarter for which he has established a base period use is multiplied by the percentage or percentages fixed in the supplement to this order for that use or class of products and the numbers which result are added, and the total is his allotment, stated in pounds, for that use or class.

Sec. 2.3. Increases in allotments based on increases in population—(a) The amount of increases. An industrial user who in 1941 delivered to an area listed in the supplement to this order products for which he may obtain an allotment may, for each allotment period, obtain an increase in the allotment he is entitled to get under Section 2.2. The amount of the increase is determined as follows:

(1) Determine the amount of sugar which he used in products he delivered in 1941 to the listed area.

(2) Determine the amount of sugar which he used in all products he delivered in 1941.

(3) Divide the number obtained in (1) by the number obtained in (2).

(4) Multiply the number obtained in (3) by the percentage shown for that area for such allotment period in section 4.1 of Supplement No. 1. (The result is the percentage by which the industrial user's allotment is increased.)

(5) If he made deliveries to more than one listed area, add together the percentage increases in allotment for all such areas. (This is the total percentage by which his allotment is increased.)

(6) Multiply the total percentage increase (the figures obtained in (4), if he made deliveries to one listed area, or (5), if he made deliveries to more than one listed area) by the industrial user's allotment as determined under section 2.2 for the allotment period for each use or class of product. (This is the amount of the increase in allotment to which the industrial user is entitled, under this section, for that allotment period.)"